

Exhibit A

IN THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

IN THE ORIGINAL JURISDICTION
OF THE SUPREME COURT

Governor Mark Sanford.....Petitioner,

v.

South Carolina State Ethics Commission and
Herbert R. Hayden, Jr., in his official capacity as
Executive Director of the State Ethics Commission..... Respondent.

AFFIDAVIT

Herbert R. Hayden, Jr., personally appeared before me and, after being duly sworn, stated as follows:

1. I am over the age of 18 and competent to make this affidavit, and the facts stated within this affidavit are within my personal knowledge and are true and correct to the best of my knowledge and belief.
2. I am the Executive Director of the South Carolina State Ethics Commission and have served in this capacity since July 1999. I started as an investigator with the Commission in 1988. In the mid-1990s, I became the assistant director of the Commission, serving until I was appointed as Executive Director in July 1999.
3. The State Ethics Commission, among other duties, is responsible for initiating or receiving complaints and making investigations of violations of the Ethics,

Government Accountability, and Campaign Reform Act of 1991, as amended (the "Ethics Act").

4. When a complaint is filed, a determination is made as to whether there are sufficient facts to warrant an investigation as required by Commission Regulation §§ 52-702 and 52-704 and South Carolina Code § 8-13-320(10)(b). If it is determined that there are not sufficient facts, the complaint is dismissed. If a determination is made that there are sufficient facts, a letter is transmitted to the respondent informing him of this determination.
5. The purpose of investigating the complaint is to "determine whether probable cause exists to believe a violation of law has occurred" as stated in Commission Regulation § 52-705(A) and South Carolina Code § 8-13-320(10)(c), (d).
6. During the investigation, Commission staff affords the respondent with "the opportunity to be heard on the alleged violation under oath, the opportunity to offer information, and the appropriate due process rights, including but not limited to, the right to counsel" in accordance with South Carolina Code § 8-13-320(10)(h). In addition, Commission Regulation 52-705(C) requires that the investigation include any "timely received written response of the Respondent; any oral response received from the Respondent; other evidence submitted by any person to the Commission and other evidence gathered by the Commission."
7. At the conclusion of the investigation, the "Commission staff will present a written report of investigation to the Commission with findings of fact, conclusions of law and a recommendation whether probable cause exists" in accordance with Commission Regulation § 52-705(C)(3).

8. It is the regular practice of the Commission staff to prepare at the conclusion of the investigation an Investigative Report concerning the investigation and containing a detailed discussion of all of the evidence and information obtained during the investigation and including any information or testimony provided by the respondent.
9. To prepare the "written report of investigation" for presentation to and use by the Commission in determining whether probable cause exists, the Commission staff prepares a less-detailed version of the Investigative Report that usually is shorter, but that includes information sufficient for the Commission to make its probable cause determination and also includes any information or testimony provided by the respondent.
10. The Preliminary Report is presented only to the Commission for use in determining whether probable cause exists and is not released to anyone other than the Commissioners and Commission staff.
11. The more detailed Investigative Report is not disclosed to the Commission because it is used as a basis for organizing and presenting the case to the Commission in the event probable cause is found.
12. The Investigative Report is, however, released to the respondent and their attorney.
13. If the Commission staff finds evidence of criminal activity or violations of other statutes, the Investigative Report—not the Preliminary Report—is released to the Attorney General or another prosecuting authority.

14. On August 18, 2009, the State Ethics Commission initiated an investigation regarding Governor Mark Sanford pursuant to the South Carolina Ethics Act. A copy of the letter informing Governor Sanford of the determination that there are "facts sufficient" to warrant an investigation is attached as Exhibit 1 to this Affidavit.
15. That investigation is ongoing, and I anticipate it will be completed around the last week of October 2009.
16. Because the investigation is ongoing and has not been completed, neither the Preliminary Report nor the Investigative Report has been prepared and, thus, no report is available for presentation to the Commissioners or for release to any other agency or to Governor Sanford.
17. I anticipate that, when the investigation is completed, a Preliminary Report will be presented to the Commissioners for use in making a determination of probable cause but, in accordance with standard practice, will not be presented or released to any other person or entity.
18. On August 24, 2009, the State Ethics Commission received a letter from Hall & Bowers, LLC, and signed by Karl S. Bowers, Jr., confirming that he and his law firm would be representing Governor Sanford in the Commission's investigation. A copy of this letter is attached as Exhibit 2 to this Affidavit.
19. By letter dated August 27, 2009, I responded to Mr. Bowers to explain my view of the ramifications of the confidentiality waiver. A copy of this letter is attached as Exhibit 3 to this Affidavit.

20. Governor Sanford wrote a letter to the Ethics Commission on August 28, 2009, waiving his right to confidentiality during the Commission's investigation. A copy of this letter is attached as Exhibit 4 to this Affidavit.
21. On or about September 8, 2009, I met with and advised Governor Sanford's counsel that, as he acknowledged by letter dated September 9, 2009, the Commission staff will "notify [him] of any issue that they believe may support a finding of probable cause and will offer [Governor Sanford] the opportunity to present evidence, facts, or arguments regarding such issues" and that any response from Governor Sanford "will be included in any written report presented to the Commission." A copy of the September 9, 2009 letter is attached as Exhibit 5 to this Affidavit.
22. Also, on or about September 8, 2009, I advised Governor Sanford's counsel that, as he acknowledged in the letter attached as Exhibit 5, the "Commission will entertain a motion from [Governor Sanford] to prevent the disclosure of any written report of investigation to any person or entity other than the Commission or the Respondent, including but not limited to the General Assembly or any member or employee thereof."
23. The Commission staff will provide the more detailed Investigative Report to Respondent, and also will forward the Investigative Report to the Attorney General.
24. If the House of Representatives initiates Impeachment proceedings, it is my opinion that that body then becomes "another prosecuting authority" under

Commission Regulation § 52-718(C)(3) and, at that time, can be given a copy of the Investigative Report pursuant to the terms of the regulation.

25. To the best of my knowledge as of this date, the House of Representatives has not initiated Impeachment proceedings.

26. However, consistent with my representations, Governor Sanford through counsel has filed with the Commission a "Motion to Enjoin Dissemination of Investigative Report and all Other Materials Related to These Proceedings," which was received by the Commission on September 14, 2009. A copy of this motion is attached as Exhibit 6 to this Affidavit.

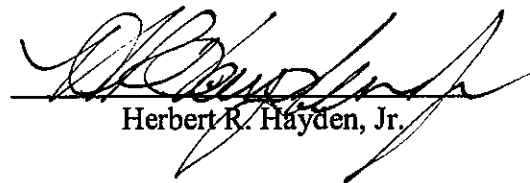
27. Also, by letter dated September 15, 2009, Cathy L. Hazelwood, Deputy Director and General Counsel, wrote a letter to Governor Sanford's counsel stating as follows in pertinent part:

This motion has been prematurely filed as the investigation is very much ongoing and no report has been begun, let alone completed. The urgency of the matter is non-existent, since you will receive the report when the Commission receives the report. At that time you will have the opportunity to argue any and all motions related to this matter. No report will be provided to anyone until such time as the Commission receives it from staff.

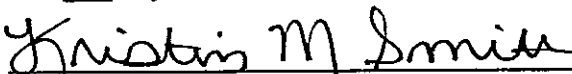
A copy of the Deputy Director's letter is attached as Exhibit F to the Petition for Writ of Mandamus.

28. The Commission has not yet heard argument on Governor Sanford's motion, and the Commission staff will not release any report to the House of Representatives unless and until the Commission rules on and denies the Governor's motion. If the Commission grants Governor Sanford's motion, the report will not be released to the House.

29. Therefore, based on the pertinent statutory and regulatory provisions and Governor Sanford's motion pending before the Commission, and consistent with the representations made to Governor Sanford's counsel by the Deputy Director and myself, the Commission staff will not release the Investigative Report to the House of Representatives by its own initiative unless and until two conditions are present: (1) the Commission rules on and authorizes release of the Investigative Report to the House of Representatives by denying Governor Sanford's motion and (2) the House of Representatives initiates Impeachment proceedings.


Herbert R. Hayden, Jr.

Sworn to and subscribed before me
this 5th day of October 2009



Notary Public for South Carolina

My Commission Expires: 4-22-15

Exhibit 1 to Exhibit A

State of South Carolina State Ethics Commission

COMMISSIONERS
SUSAN P. McWILLIAMS, MEMBER AT LARGE
CHAIR
PHILLIP FLORENCE, JR., MEMBER AT LARGE
VICE CHAIR
RICHARD H. FITZGERALD, 1ST DISTRICT



COMMISSIONERS
EDWARD E. DURYEA, 2ND DISTRICT
E. KAY BIERMANN BROHL, 3RD DISTRICT
J. B. HOLEMAN, 4TH DISTRICT
JONATHAN H. BURNETT, 5TH DISTRICT
PRISCILLA L. TANNER, 6TH DISTRICT
G. CARLTON MANLEY, MEMBER AT LARGE

5000 THURMOND MALL, SUITE 250
COLUMBIA, S.C. 29201

HERBERT R. HAYDEN, JR.
EXECUTIVE DIRECTOR

August 18, 2009

Governor Mark Sanford
Post Office Box 11267
Columbia, SC 29211

RE: Complaint C2010-020 In the Matter of Governor Mark Sanford

Dear Governor Sanford:

In accordance with Section 8-13-320(10) Code of Laws for S.C., 1976, as amended, the State Ethics Commission has reviewed information provided and determined that there are sufficient facts to warrant an investigation. You will be contacted in the near future by an investigator concerning any evidence or statements you may desire to make. If you wish, you may provide a written response to the complaint, including any documentation you wish the Commission to consider. If you will be represented by an attorney, have him/her provide the Commission with a letter of representation as soon as possible.

In accordance with Section 8-13-320(9) and (10), all complaints, investigations, inquires, hearings, and accompanying documents are confidential unless the respondent waives the right to confidentiality in writing to the Commission, or the Commission issues a public disposition. The willful release of confidential information is a misdemeanor, and any person releasing such confidential information, upon conviction, must be fined not more than one thousand dollars or imprisoned for not more than one year.

In accordance with Section 8-13-320(10)(a) of the Ethics Reform Act, enclosed is a copy of the complaint.

I am also enclosing a copy of the State Ethics Complaint Guide which details the conduct of investigations concerning complaints filed with the State Ethics Commission. We shall keep you informed of the status of this complaint.

Sincerely,

A handwritten signature in dark ink, appearing to read "Herb Hayden", is written over a horizontal line. Below the signature, the name and title of the signatory are printed.

Herbert R. Hayden, Jr.
Executive Director

HRHjr:raw

Enclosures
1. Complaint Form
2. Complaint Guide

Exhibit 2 to Exhibit A



HALL & BOWERS, LLC
ATTORNEYS AT LAW

1329 Blanding Street | Columbia, SC 29201
P.O. Box 12107 | Columbia, SC 29211

803.454.6504 tel
803.454.6509 fax
hallbowers.com

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2009 AUG 24 PM 2:24

August 24, 2009

KEVIN A. HALL
kevin.hall@hallbowers.com
KARL S. (BUTCH) BOWERS, JR.
butch.bowers@hallbowers.com
M. TODD CARROLL
todd.carroll@hallbowers.com

Via Facsimile

Herbert R. Hayden, Jr.
Executive Director
State Ethics Commission
5000 Thurmond Mall, Suite 250
Columbia, SC 29201

RE: Complaint C2010-020
In the Matter of Governor Mark Sanford
Out File No.: 27049/01500

Dear Mr. Hayden:

Please accept this letter as confirmation that the law firm of Hall & Bowers, LLC represents Governor Mark Sanford in the above captioned matter. Kevin Hall, Todd Carroll, and I are the attorneys involved in this representation, and we are all authorized to communicate with the Ethics Commission as counsel to Governor Sanford in this case.

In our recent discussions, you have described the impact of a potential waiver of Governor Sanford's right to confidentiality in this matter. Based on the information you provided to me, it is my understanding that if Governor Sanford waives his right to confidentiality, the following will apply:

1. The only information that will be made public during the pendency of this matter is the fact that an investigation is being conducted and the Complaint Form itself,
2. The investigation and the results thereof, including any statements or documents, will remain confidential and will not be made public at any time, either during or after the conclusion of this matter;
3. If a hearing is held in this matter, such hearing will be held in executive session unless Governor Sanford requests an open hearing; and
4. Any action taken by the Commission will be made public upon final disposition.

Exhibit 3 to Exhibit A

State of South Carolina State Ethics Commission

COMMISSIONERS
SUSAN P. McWILLIAMS, MEMBER AT LARGE
CHAIR
PHILLIP FLORENCE, JR., MEMBER AT LARGE
VICE CHAIR
RICHARD H. FITZGERALD, 1ST DISTRICT



COMMISSIONERS
EDWARD E. DURYEA, 2ND DISTRICT
E. KAY BIERMANN BROHL, 3RD DISTRICT
J. B. HOLEMAN, 4TH DISTRICT
JONATHAN H. BURNETT, 5TH DISTRICT
PRISCILLA L. TANNER, 6TH DISTRICT
G. CARLTON MANLEY, MEMBER AT LARGE

5000 THURMOND MALL, SUITE 250
COLUMBIA, S.C. 29201

HERBERT R. HAYDEN, JR.
EXECUTIVE DIRECTOR

August 27, 2009

Mr. Karl S. Bowers, Jr.
Hall & Bowers, LLC
P.O. Box 12107
Columbia, SC 29211

Re: Complaint C2010-020
In the Matter of Governor Mark Sanford
File No.: 27049/01500

Dear Mr. Bowers:

This letter will confirm receipt of your notice of representation in the above-captioned matter. All correspondence and investigative requests will be submitted to you.

Also, in your letter you listed four items regarding a possible waiver of confidentiality by Governor Sanford. Item 2 needs to be clarified; therefore, I will address these items in this letter rather than signing your letter. If Governor Sanford waives his right to confidentiality, the following will apply:

1. The only information that will be made public during the pendency of this matter is the fact that an investigation is being conducted and the Complaint Form itself;
2. The investigative report, including any statements or documents, will not become a part of the public record; however, any testimony given, documents entered into evidence at an administrative hearing, and the Commission's findings will become a part of the formal record along with the Commission's Decision and Order, and will be public;
3. If a hearing is held in this matter, such hearing will be held in executive session unless Governor Sanford requests an open hearing; and
4. Any action taken by the Commission will be made public upon final disposition.

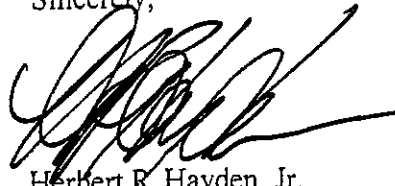
Mr. Karl S. Bowers, Jr.
August 27, 2009
Page 2 of 2

The only item that is affected by a waiver of confidentiality is Item 1. Items 2, 3 and 4 are required by either statute or regulation and will apply regardless of a waiver.

In addition, a copy of the investigative report will be provided to the Attorney General for his review and whatever action he deems appropriate.

Let me know if you have any questions or need additional information.

Sincerely,



Herbert R. Hayden, Jr.
Executive Director

Exhibit 4 to Exhibit A



State of South Carolina

Office of the Governor

MARK SANFORD
GOVERNOR

POST OFFICE BOX 12267
COLUMBIA 29211

August 28, 2009

Mr. Herbert R. Hayden, Jr.
Executive Director
State Ethics Commission
500 Thurmond Mall, Suite 250
Columbia, South Carolina 29201

Dear Mr. Hayden,

As you well know, this administration has consistently gone the extra mile in fighting for transparency in our state government. Successes on that front include the Campaign Financial Disclosure bill, our direction to the Cabinet to end the long-standing practice of legislative pass-throughs, online campaign finance disclosure with your agency, recorded votes reform, and most recently our work with the Comptroller General's office on online disclosure of state spending.

In an effort to once again go the extra mile, I would like to waive my right to confidentiality in your upcoming ethics probe. I believe that what the whole of our travel records will show is that this administration has worked very hard to be a good steward of taxpayer resources.

It's also my hope that my decision to take the unilateral step of waiving confidentiality will serve to encourage both the public to invite, and legislators to lead, in changing the current system. In this system all constitutional officers, and every state employee, is held to one standard - while the General Assembly lives under a completely different standard without transparency. I strongly believe this needs to change, and again do hope this is one of the byproducts of what takes place this fall.

Thank you again for your work on behalf of the people of the state.

Sincerely,

A handwritten signature in dark ink, appearing to be "MS", written over a horizontal line.

Mark Sanford

Exhibit 5 to Exhibit A



HALL & BOWERS, LLC
ATTORNEYS AT LAW

1329 Blanding Street | Columbia, SC 29201
P.O. Box 12107 | Columbia, SC 29211

803.454.6504 tel
803.454.6509 fax
hallbowers.com

September 9, 2009

Via Facsimile

Herbert R. Hayden, Jr.
Executive Director
State Ethics Commission
5000 Thurmond Mall, Suite 250
Columbia, SC 29201

RE: Complaint C2010-020
In the Matter of Governor Mark Sanford
Our File No.: 27049/01500

Dear Herb:

Thank you and Don for taking the time to meet with Kevin and me yesterday regarding the above referenced matter. As we indicated yesterday, it is our desire to make sure that the Commission has all information necessary to make factually accurate judgments. This, of course, will require a great deal of cooperation between your staff and our office. It will also require that we be given an opportunity to respond to any concern or allegation involving our client. We will rely on you and your staff to advise us of those concerns or allegations so that we can respond to them on an itemized basis. We stand ready, willing and able to respond to any questions or concerns that the Commission might have, and we look forward to addressing these issues item-by-item as you notify us of them.

As indicated, we will provide the Commission with a list of employees in the Governor's office, along with their contact information. We also will provide the documents you requested on September 1, 2009. In addition, please allow this letter to confirm the following:

- Our client will be entitled to engage in written discovery and to take and use depositions in this matter.
- Throughout the course of the investigation and prior to presenting a written report to the Commission, the Commission's investigators will notify us of any issue that they believe may support a finding of probable cause and will offer our client the opportunity to present evidence, facts, or arguments regarding such issues. Our client's response will be included in any written report presented to the Commission.
- The Commission will entertain a motion from us to prevent the disclosure of any written report of investigation to any person or entity other than the Commission or the Respondent, including but not limited to the General Assembly or any member or employee thereof.

KEVIN A. HALL
kevin.hall@hallbowers.com
KARL S. (BUTCH) BOWERS, JR.
butch.bowers@hallbowers.com
M. TODD CARROLL
todd.carroll@hallbowers.com

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Thank you again for your time yesterday. We look forward to working with you, the Commission and its staff to ensure that this is a fundamentally fair process.

Yours very truly,

A handwritten signature in cursive script, appearing to read "Karl S. Bowers, Jr.", written in dark ink.

Karl S. Bowers, Jr.

Exhibit 6 to Exhibit A

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

BEFORE THE
STATE ETHICS COMMISSION

RECEIVED
2009 SEP 14 PM 4:45
COMMISSION

IN THE MATTER OF:)
)
)

Complaint C2010-020)
)

State Ethics Commission,)
)

Complainant,)
)

vs.)
)

Governor Mark Sanford,)
)

Respondent.)
)

MOTION TO ENJOIN
DISSEMINATION OF
INVESTIGATIVE REPORT AND ALL
OTHER MATERIALS RELATED TO
THESE PROCEEDINGS

Governor Mark Sanford respectfully requests an order enjoining the South Carolina State Ethics Commission, including all Commissioners and staff members, from disseminating during the pendency of this case any investigative reports, recommendations, pre-hearing reports, or any other written or oral materials or information regarding this matter that may be created by any person associated with the Commission. The grounds for this Motion are as follows:

INTRODUCTION

Public Awareness of This Case Has Created Misunderstandings About the Governing Law

The attention that has been focused on this case—by the media, the public, and, perhaps most importantly, the General Assembly—is unprecedented in recent years. Based on media accounts, this intense interest apparently has generated a series of misunderstandings of the State Ethics Code's reporting requirements and the procedures that are to be followed in a contested case of this nature. Among these is the belief among some members of the press and some legislators that they are entitled to a copy of the preliminary written report of the Commission staff's factual findings, legal conclusions, and probable cause recommendations prior to the

conclusion of all proceedings before the Commission. This position, however, is squarely contrary to the State Ethics Code's strict confidentiality requirements. And although these press outlets and legislators have staked a position that is directly rebutted by state law, the Commission's Executive Director has publicly and privately confirmed that the Commission intends to provide members of the General Assembly with a copy of this preliminary report contemporaneously with its submission to the Governor and to the Commissioners. This contemplated action is against the law.

The Ethics Code Creates a Confidential Process for Resolving Cases

The State Ethics Code establishes a detailed, multilayered process for resolving disputed ethics violations:

First: Upon receipt of information accusing a public official of violating the law, the Commission reviews the allegations to assess whether they are sufficient to state a cause of action under the State Ethics Code. S.C. Code Ann. §§ 8-13-320(10)(a), (b), (d).

Second: If the Commission determines that the allegations sufficiently state a violation of the Ethics Code, it may order an investigation into the claims. *Id.* § 8-13-320(10)(c). "The purpose of an investigation is to determine whether probable cause exists to believe a violation of law has occurred which may subject the Respondent to sanctions by the Commission, criminal prosecution by the State, and/or civil liability, as appropriate." S.C. Code Ann. Regs. 52-705(A). During this investigation, the Commission's investigators may subpoena and depose witnesses, obtain documents, "and take such other action as is necessary to prepare a preliminary determination of the facts relating to the issues alleged in the complaint." *Id.* 52-705(C)(1).

Third: At the conclusion of the investigation, the Commission staff prepares a "preliminary written decision with findings of fact and conclusions of law," along with a recommendation to the Commissioners regarding whether there is probable cause to believe that a violation of the State Ethics Code occurred. S.C. Code Ann. § 8-13-320(10)(i).

Fourth: The entire panel of Commissioners considers the information discovered during the staff's investigation and holds a hearing on whether probable cause exists to believe that a violation has occurred. *Id.* If the Commissioners find that such probable cause exists based on the staff's investigation, they must order "a hearing before a panel of three commissioners, selected at random, to determine whether a violation of the chapter has occurred." *Id.* If probable cause does not exist, then the case is terminated.

Fifth: If the Commissioners find probable cause and order a merits hearing, the respondent—here, Governor Sanford—may, for the first time, answer the complaint and respond to the charges against him. S.C. Code Ann. Regs. 52-709.

Sixth: Prior to the merits hearing, “the respondent must be allowed to examine and make copies of all evidence in the commission’s possession relating to the charges.” S.C. Code Ann. § 8-13-320(10)(j). The respondent is also given the ability to engage in discovery to prove his innocence. *Id.*

Seventh: At the merits hearing, the respondent must be given the opportunity to confront and cross-examine witnesses, call his own witnesses, and introduce evidence. *Id.* The merits hearing is held in executive session unless the respondent moves to have an open hearing. *Id.*

Eighth: Within sixty days after the conclusion of the merits hearing, the three-Commissioner panel must issue a written order containing its findings of fact and conclusions of law. *Id.* § 8-13-320(10)(k).

Ninth: If the three-member panel’s decision is adverse, the respondent may request a hearing before the entire Commission. *Id.* § 8-13-320(10)(m). If necessary, further evidence may be presented to the full Commission. S.C. Code Ann. Regs. 52-806(A), 52-807.

Tenth: The respondent may appeal any adverse decision from the full Commission to the Court of Appeals. S.C. Code Ann. § 8-13-320(10)(m).

Critically, the General Assembly insulated this process from potentially prejudicial outside influences by building key confidentiality provisions into the State Ethics Code. As noted above, the merits hearing must be held in executive session. *Id.* § 8-13-320(10)(j). Likewise, “[a]ll investigations, inquiries, hearings, and accompanying documents must remain confidential until final disposition of a matter unless the respondent waives the right to confidentiality.” *Id.* § 8-13-320(10)(g). Only after the Commission has fully adjudicated a case does it become subject to public view. *Id.* § 8-13-320(10)(o). But even then, the Commission’s preliminary reports and other working papers remain confidential. S.C. Code Ann. Regs. 52-718(F). Although this case is only in Stage Two on the above list, the Commission has indicated its intention to publicly disseminate information that, by law, always remains confidential.

Maintaining Confidentiality Protects Several Important Interests

Preserving the confidentiality of ethics proceedings serves several important purposes. If publicized, ethics proceedings can clearly be misused for political gain. Additionally, proceeding in confidence prevents the Commission from being subjected to undue outside pressures in its decision-making process, precludes tampering with witnesses and evidence, encourages people with relevant information to speak freely, and protects the innocent accused from disclosure of the fact that he was under investigation. All of these safeguards are put at risk if the confidentiality of an ethics proceeding is jeopardized. This is particularly true when, as here, the proposed breach of confidence will take place before the respondent even has a chance to present his own defense.

In order to uphold the State Ethics Code's direct language, its recognized intent to protect respondents in ethics proceedings from being improperly and prematurely judged by the electorate based on an incomplete record, and established notions of fairness and due process, the Commission should prohibit the dissemination of any preliminary reports or other information regarding the facts or applicable law of this case. To do otherwise would irreparably prejudice these proceedings and any other legal proceedings to which the Governor may be a party.

FACTUAL BACKGROUND

On August 18, 2009, the Commission mailed a "Complaint Form" to Governor Sanford along with a letter explaining that the Commission "has reviewed information provided and determined that there are sufficient facts to warrant an investigation" of the Governor. The Complaint Form alleged a series of possible violations of the State Ethics Code, and it relied exclusively on "an investigation by an Associated Press reporter, and articles appearing in numerous South Carolina newspapers" as the factual bases for the Commission's investigation.

Shortly after submitting the complaint, the Commission's Executive Director sent the Governor's counsel a letter that stated as follows:

If Governor Sanford waives his right to confidentiality, the following will apply:

1. The only information that will be made public during the pendency of this matter is the fact that an investigation is being conducted and the Complaint Form itself.
2. The investigative report, including any statement or documents, will not become a part of the public record

* * *

In addition, a copy of the investigative report will be provided to the Attorney General for his review and whatever action he deems appropriate.

Ex. A, Letter from Herbert R. Hayden, Jr., Executive Director, State Ethics Commission, to Karl S. Bowers, Jr., counsel for Governor Sanford, at 1-2 (August 27, 2009) (emphasis added). These guarantees are consistent with and required by the Ethics Code. South Carolina Code § 8-13-320(10)(g) assures that, absent a written waiver, "[a]ll investigations, inquiries, hearings, and accompanying documents must remain confidential until final disposition of a matter." Likewise, Regulation 52-718(F) specifically provides that "[t]he Commission's internal and investigatory papers including attorney work product shall not be made part of the public record." Based on these guidelines, Governor Sanford provided a waiver of confidentiality for these proceedings with the expectation that only the Complaint Form would be made publicly available. Ex. B, Letter from Governor Sanford to Herbert R. Hayden, Jr. (August 28, 2009).

Despite the direct terms of the State Ethics Code, its accompanying regulations, and representations contained in his August 27th letter, the Executive Director informed Governor Sanford's counsel during an in-person meeting on Tuesday, September 8, 2009, that the Commission intended to provide a copy of any preliminary investigative report to selected

members of the General Assembly prior to the conclusion of these proceedings or even the Commission's probable cause hearing. He later confirmed this intention during (1) a telephone call with the below-signed counsel on the afternoon of Thursday, September 10, 2009, and (2) interviews given to the media that same day. As reported in *The State* newspaper: "But Hayden said that once the House [of Representatives] opens impeachment hearings, it becomes a prosecutorial body and can have access to the Ethics Commission reports." Ex. C, John O'Connor, "Sanford Fears 'Kangaroo Court,'" *The State*, Sept. 11, 2009, at B1. Because this position is without any legal basis and, instead, is contradicted by the State Ethics Code and the South Carolina Constitution, the Executive Director must be prohibited from disclosing the preliminary report or any other unauthorized information about this case.

ARGUMENTS AND AUTHORITIES

As a matter of law, the Commission is forbidden from disseminating any reports or other information regarding its investigation of the Governor. First, the State Ethics Code is replete with assurances of confidentiality surrounding ethics investigations and bars the Commission from providing any information about its internal investigation to anyone other than the Attorney General. Second, due process demands that internal and investigatory materials related to ethics proceedings remain confidential so that respondents are not wrongfully exposed to public scrutiny for allegations of misconduct without a full and complete opportunity to confront their accusers, examine the evidence, and present rebuttal arguments and evidence. This concern is especially relevant here in light of correspondence from the Commission assuring the Governor that any investigative written report would remain out of public view. Each of these is discussed below.

I. THE STATE ETHICS CODE EXPRESSLY FORBIDS THE COMMISSION FROM DISTRIBUTING ITS WRITTEN REPORT TO ANYONE OTHER THAN THE ATTORNEY GENERAL.

The primary basis for this Motion is found in the straightforward, unambiguous provisions of the State Ethics Code. Section 8-13-320, which enumerates the scope and limits of the Commission's authority, provides as follows:

The State Ethics Commission has these duties and powers:

* * *

- (10) to conduct its investigations, inquiries, and hearings in this manner:

* * *

- (g) All investigations, inquiries, hearings, and accompanying documents must remain confidential until final disposition of a matter unless the respondent waives the right to confidentiality. The wilful release of confidential information is a misdemeanor, and any person releasing such confidential information, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than one year.

S.C. Code Ann. § 8-13-320(10)(g). By its plain terms, therefore, the Commission's enabling statute forbids the Commission from releasing any investigative reports or information related to this matter to the public. Moreover, the General Assembly considered the confidentiality of these proceedings to be so serious that it attached criminal punishments to any breach of this confidentiality. *Id.* Of course, statutes must be applied according to their express language rather than tortured to arrive at an unintended meaning. *Howell v. U.S. Fid. & Guar. Ins. Co.*, 370 S.C. 505, 509 (2006).

The investigative report's strict confidentiality is reinforced in the Commission's own regulations. In particular, Regulation 52-718 prohibits anyone employed by or associated with the Commission from "disclos[ing] any information pertaining" to a complaint. S.C. Code Ann. Regs. 52-718(A). It continues: "The Commission's internal and investigatory papers including

attorney work product shall not be made part of the public record.” *Id.* 52-718(F). Critically, nowhere does either the statute or its accompanying regulations vest the Commission with any discretion to distribute materials associated with an ongoing case to the General Assembly. Nor is there any legal basis for approaching this issue with an eye towards flexibility or balancing competing interests. Instead, the State Ethics Code is quite clear that materials related to an investigation must remain confidential in all circumstances.

Despite this unavoidable outcome, the Commission has publicly and privately stated that it will distribute its preliminary investigative report to the General Assembly—even before the Commission is able to hold a probable cause hearing—because of speculation that some lawmakers may file articles of impeachment against the Governor. In order to bypass the straightforward language of the statutes and regulations quoted above, the Commission’s Executive Director has argued that the legislators’ political posturing would somehow convert the state’s legislative body into a law-enforcement body or, in the terms of Regulation 52-718(C), a “prosecuting authority.” Ex. C, O’Connor, “Sanford Fears ‘Kangaroo Court,’” at B1. But this position, which disregards all notions of separation of powers and essentially consolidates executive and legislative authority in a single branch of government, is squarely rebutted by the South Carolina Constitution, the State Ethics Code, and controlling case law.

First, the Constitution establishes the Attorney General as the sole prosecuting authority in South Carolina. *See* S.C. Const. art. V, § 24 (“The Attorney General shall be the chief prosecuting officer of the State with authority to supervise the prosecution of all criminal cases in courts of record.”). To be sure, the State Supreme Court has confirmed that vesting prosecutorial power in any entity other than the Attorney General is unconstitutional, even for putative violations of the State Ethics Code. *See State v. Thrift*, 312 S.C. 282, 307 (1993)

(reminding that the Attorney General is the state's "chief prosecuting officer" and stating that any interpretation of the State Ethics Code that would vest prosecutorial authority in any entity other than the Attorney General would be unconstitutional), *withdrawn, reinstated, and amended in unrelated part* by 1994 S.C. LEXIS 25 (1994). In fact, in enacting the Ethics Code, the General Assembly specifically designated the Attorney General, not the legislature, as the "prosecuting authority" for violations of the Act. See S.C. Code Ann. § 8-13-320(8) (allowing the Commission "to request the Attorney General, in the name of the commission, to initiate, prosecute, defend, or appear in a civil or criminal action for the purpose of enforcing the provisions of this chapter"); *id.* § 8-13-320(10)(h) ("The commission, in its discretion, may turn over to the Attorney General for prosecution apparent evidence of a violation of the chapter."); *id.* § 8-13-320(10)(k) ("The commission panel, where appropriate, shall recommend disciplinary or administrative action, or in the case of an alleged criminal violation, refer the matter to the Attorney General for appropriate action.").

Second, the constitutional provisions that address impeachment are clear that an impeachment proceeding is not on par with a criminal prosecution. To the contrary, under the South Carolina Constitution, an impeachment is expressly not a prosecution. See S.C. Const. art. XV, § 2 ("Impeachment proceedings . . . shall not be a bar to criminal prosecution and punishment according to law."). And in any event, no articles of impeachment have been filed in the House of Representatives, nor have any other impeachment proceedings even been commenced. Accordingly, the General Assembly is not a prosecutorial body and is therefore not entitled to any of the Commission's investigative materials or reports. The Executive Director and all other personnel with the Commission should be enjoined from violating the strict confidentiality provisions of the State Ethics Code as a result.

II. RELEASING INVESTIGATORY INFORMATION REGARDING THIS CASE WOULD VIOLATE DUE PROCESS AND FUNDAMENTAL FAIRNESS.

In addition to being an overt, criminal violation of the State Ethics Code, releasing any materials and information relating to this investigation to the General Assembly or the public at large would violate the Governor's due process rights and general notions of fairness. First, the State Ethics Commission has acknowledged on several occasions that the Ethics Code's confidentiality provisions are in place to protect respondents from misguided, one-sided public scrutiny. Second, and more fundamentally problematic, the Executive Director has already confirmed in writing that the Commission would not publicly disclose any substantive information about this case—including any written materials—until final disposition of this case.

A. The Commission has recognized confidentiality of ethics proceedings as a procedural right guaranteed by the State Ethics Code.

The State Ethics Code repeatedly guarantees that a respondent shall enjoy all procedural rights that are necessary to ensure a just administration of his case. The right to counsel, for instance, is guaranteed under the statute. S.C. Code Ann. § 8-13-320(10)(j). Numerous other procedural rights are found in the Ethics Code. *See, e.g.*, S.C. Code Ann. §§ 8-13-320(10)(a), (d) (requiring that any complaint sanctioned by the Commission to be accompanied by “a statement of the due process rights of the respondent”); *id.* § 8-13-320(10)(h) (ensuring that respondents receive “the appropriate due process rights” during the investigatory stage); *id.* § 8-13-320(10)(j) (providing that “the respondent must be afforded appropriate due process protections, including the right to be represented by counsel, the right to call and examine witnesses, the right to introduce exhibits, and the right to cross-examine opposing witnesses” during a hearing).

The confidentiality of ethics proceedings is chief among these procedural guarantees. *E.g., id.* § 8-13-320(10)(g); S.C. Code Ann. Regs. 52-718. The Commission has recognized the

importance of the State Ethics Code's confidentiality provisions in protecting respondents several times before. *See, e.g.*, State Ethics Comm'n Advisory Op. 2002-010 (Mar. 20, 2002) (stating that "[o]bviously, the complaint filed by the Commission and all subsequent investigations, documents and hearings are confidential" and recognizing that "the confidentiality provisions are in place to protect the Respondent"); State Ethics Comm'n Advisory Op. 2000-06 (Jan. 19, 2000) (acknowledging that "[c]learly the confidentiality provisions are in place to protect the Respondent"). To be sure, Advisory Opinion 2002-010 proclaimed that "the Commission believes the confidentiality of the process is preeminent" and ended with a warning: "The wilful release of confidential information may result in a complaint matter." There can be no dispute, then, that a breach of the Ethics Code's confidentiality provisions would necessarily violate the procedural safeguards that are in place to ensure that respondents who are improperly accused of violating the Ethics Code, such as the Governor here, are able to defend and acquit themselves without being subjected to misleading attacks based on an incomplete, partial record.

B. The Commission has previously represented that any waiver of confidentiality by the Governor would be limited only to disclosure of the information contained in the Complaint Form.

Along with violating the Governor's due process rights, the Executive Director's proposed plan to disclose internal investigatory reports here would destroy the fundamental fairness of these proceedings. Although Governor Sanford has made transparency a touchstone of his administration, maintaining the confidentiality of this investigatory process here serves a necessary function in establishing a truthful and complete factual background against which the Governor's conduct can be measured. Without confidentiality of this process, the Commission can be subjected to undue political and budgetary pressures from the General Assembly,

witnesses can be intimidated by intense media pressures and may not feel like they can speak freely about the issues presented here, and the Governor could be publicly scrutinized before even having a chance to present his own evidence or to cross-examine witnesses, among a host of other procedural defects.

The Governor provided a waiver of confidentiality in this case in light of assurances received from the Commission that, in the event of a waiver, "[t]he only information that will be made public during the pendency of this matter is the fact that an investigation is being conducted and the Complaint Form itself." Ex. A, Letter from Hayden to Bowers at 1. That letter continued by stating that "[t]he investigative report, including any statements or documents, will not become a part of the public record" and indicating that the only person to whom any materials may possibly be given would be the Attorney General. *Id.* at 1-2. In order to sustain the assurances previously made, to comply with the applicable law, and to uphold the basic fairness of these proceedings, the Commission should enjoin the Executive Director, along with all others associated with the Commission, from breaching the Ethics Code's confidentiality provisions and disseminating any investigative report or other materials related to this case.

CONCLUSION

In passing the State Ethics Code, the General Assembly erected an unmistakable, impenetrable barrier between ethics proceedings and outside influences. In addition to possibly prejudicing matters before the Commission and respondents' rights in general, the General Assembly no doubt recognized that ethics proceedings can be misused by opponents for quick political gain. Thus, a keystone in this rigid wall between the Commission and the outside world is the respondent's right of confidentiality in the investigation process, which is clearly established by statute, regulation, and prior decisions of this Commission. The rule of law

demands that both the Commission and the General Assembly follow this settled procedure.

This Motion should be granted accordingly.

Respectfully submitted,

HALL & BOWERS, LLC

By: Butch Bowers

Kevin A. Hall
Karl S. Bowers, Jr.
M. Todd Carroll
1329 Blanding Street
Columbia, SC 29201
(803) 454-6504

September 14, 2009
Columbia, South Carolina

Exhibit A

Letter from Herbert R. Hayden, Jr., to
Butch Bowers (August 27, 2009)

State of South Carolina State Ethics Commission

COMMISSIONERS
SUSAN P. McWILLIAMS, MEMBER AT LARGE
CHAIR
PHILLIP FLORENCE, JR., MEMBER AT LARGE
VICE CHAIR
RICHARD H. FITZGERALD, 1ST DISTRICT



COMMISSIONERS
EDWARD E. DURYEA, 2ND DISTRICT
E. KAY BJERMANN BROHL, 3RD DISTRICT
J. B. HOLEMAN, 4TH DISTRICT
JONATHAN H. BURNETT, 5TH DISTRICT
PRISCILLA L. TANNER, 6TH DISTRICT
G. CARLTON MANLEY, MEMBER AT LARGE

5000 THURMOND MALL, SUITE 250
COLUMBIA, S.C. 29201

HERBERT R. HAYDEN, JR.
EXECUTIVE DIRECTOR

August 27, 2009

Mr. Karl S. Bowers, Jr.
Hall & Bowers, LLC
P.O. Box 12107
Columbia, SC 29211

Re: Complaint C2010-020
In the Matter of Governor Mark Sanford
File No.: 27049/01500

Dear Mr. Bowers:

This letter will confirm receipt of your notice of representation in the above-captioned matter. All correspondence and investigative requests will be submitted to you.

Also, in your letter you listed four items regarding a possible waiver of confidentiality by Governor Sanford. Item 2 needs to be clarified; therefore, I will address these items in this letter rather than signing your letter. If Governor Sanford waives his right to confidentiality, the following will apply:

1. The only information that will be made public during the pendency of this matter is the fact that an investigation is being conducted and the Complaint Form itself;
2. The investigative report, including any statements or documents, will not become a part of the public record; however, any testimony given, documents entered into evidence at an administrative hearing, and the Commission's findings will become a part of the formal record along with the Commission's Decision and Order, and will be public;
3. If a hearing is held in this matter, such hearing will be held in executive session unless Governor Sanford requests an open hearing; and
4. Any action taken by the Commission will be made public upon final disposition.

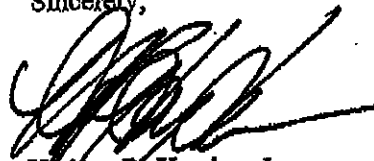
Mr. Karl S. Bowers, Jr.
August 27, 2009
Page 2 of 2

The only item that is affected by a waiver of confidentiality is Item 1. Items 2, 3 and 4 are required by either statute or regulation and will apply regardless of a waiver.

In addition, a copy of the investigative report will be provided to the Attorney General for his review and whatever action he deems appropriate.

Let me know if you have any questions or need additional information.

Sincerely,



Herbert R. Hayden, Jr.
Executive Director

Exhibit B

Letter from Governor Sanford to
Herbert R. Hayden, Jr. (August 28, 2009)



State of South Carolina

Office of the Governor

MARK SANFORD
GOVERNOR

Post Office Box 12267
COLUMBIA 29211

August 28, 2009

Mr. Herbert R. Hayden, Jr.
Executive Director
State Ethics Commission
500 Thurmond Mall, Suite 250
Columbia, South Carolina 29201

Dear Mr. Hayden,

As you well know, this administration has consistently gone the extra mile in fighting for transparency in our state government. Successes on that front include the Campaign Financial Disclosure bill, our direction to the Cabinet to end the long-standing practice of legislative pass-throughs, online campaign finance disclosure with your agency, recorded votes reform, and most recently our work with the Comptroller General's office on online disclosure of state spending.

In an effort to once again go the extra mile, I would like to waive my right to confidentiality in your upcoming ethics probe. I believe that what the whole of our travel records will show is that this administration has worked very hard to be a good steward of taxpayer resources.

It's also my hope that my decision to take the unilateral step of waiving confidentiality will serve to encourage both the public to invite, and legislators to lead, in changing the current system. In this system all constitutional officers, and every state employee, is held to one standard - while the General Assembly lives under a completely different standard without transparency. I strongly believe this needs to change, and again do hope this is one of the byproducts of what takes place this fall.

Thank you again for your work on behalf of the people of the state.

Sincerely,

A handwritten signature in black ink, appearing to be "MS", written over a horizontal line.

Mark Sanford

Exhibit C

John O'Connor, "Sanford Fears 'Kangaroo Court,'" *The State*, September 11, 2009

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News - Breaking News
Friday, Sep. 11, 2009

Sanford fears 'kangaroo court'

Resign now, S.C. GOP leadership urges governor

By JOHN O'CONNOR - joconnor@theestate.com

Gov. Mark Sanford said a state ethics panel risks the impartiality of its report if it is given to lawmakers early — and threatened legal action to prevent its release.

Sanford said the preliminary report would not include his defense, and lawmakers would use its conclusions to justify Sanford's impeachment. To turn over a draft of the report to lawmakers, Sanford said, threatens to turn the process into a "kangaroo court."

State Ethics Commission officials challenged Sanford's legal interpretation, and said the governor would have every opportunity to defend himself.



South Carolina Gov. Mark Sanford
- Erik Campos/ecampos@theestate.com /Erik Campos

PDF: Republican Party's open letter to Gov. Mark Sanford

Case against Sanford

The State Ethics Commission is investigating Gov. Mark Sanford's travel and expenses. Meanwhile, state lawmakers are expected to mount an impeachment case against him. Here is what both will be reviewing.

Sanford's secret trip to Argentina. The married Republican governor left the state for Argentina for five days while his staff, the lieutenant governor and his security team did not know where he was. Some lawmakers argue Sanford abandoned the state and job; that, they say, is misconduct serious enough

And pressure continued to build on the governor Thursday, as two-thirds — 31 of 46 members — of the state Republican Party leadership voted to ask for his resignation. In July, the group had merely censured him for leaving the state for a secret five-day trip to Argentina after which he later admitted an extramarital affair.

"As an Executive Committee, we are not suggesting that you should or should not be impeached," chairwoman Karen Floyd wrote in a letter to Sanford. "Our state simply cannot wait until it concludes before moving forward."

Earlier this week, House Speaker Bobby Harrell, R-Charleston, and most House Republicans asked Sanford to resign.

Sanford, as he has said for weeks, has no plans to resign.

The S.C. GOP should not rush to a political judgment before all the facts are in, Sanford said, and any legal investigation needs to be fair.

"It is not OK to short-circuit an ethics process to try and get the result you

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DON'T Pay for White Teeth
Learn the trick discovered by a

to warrant impeachment.

Misuse of state airplanes. State law bars any use of state planes other than for official business. Sanford, according to state documents, used a state plane to ferry family members and to attend political functions, possible violations of state law.

Using expensive airfares on foreign trips. State law requires the use of the most economical travel available. Sanford used more expensive airfare, according to state documents.

Failure to disclose private plane trips. The Associated Press reported Sanford accepted 35 rides on private planes that he did not disclose in his state ethics report, a possible violation of state law.

want," Sanford said. "If you go this route, then you're setting up a kangaroo court."

Sanford's complaint is that lawmakers are seeking access to an early version of the report that lays out the facts, similar to an indictment in a criminal trial. State law says only the attorney general and other prosecutors can see the early report, said Sanford attorney Butch Bowers.

Typically, the early report is only released once the Ethics Commission hears evidence from all sides and votes on whether a criminal, ethical or no violation has occurred. The investigation is expected to take up to eight weeks, and an early report would be issued sometime before then.

Releasing the early report could compromise his impeachment hearing, Sanford said, because it would not contain the governor's defense. Bowers said Sanford will pursue legal action to prevent the report's release.

"I'll use every tool in the tool box," Sanford said.

But Herbert Hayden, executive director of the State Ethics Commission, disagreed with Sanford's argument.

"That is just totally untrue to say that they're not going to have a chance to present their case," Hayden said, adding Sanford is clouding the issue.

But Hayden said that once the House opens impeachment hearings, it becomes a prosecutorial body and can have access to Ethics Commission reports.

"They have a different interpretation of the law," Hayden said.

Legal experts have noted that lawmakers determine impeachment standards, and lawmakers said the Ethics Commission investigation is separate from impeachment.

Some lawmakers have said Sanford committed "serious misconduct" — the S.C. Constitution standard for impeachment — when he secretly left the state for five days.

Reach O'Connor at (803) 771-8358.

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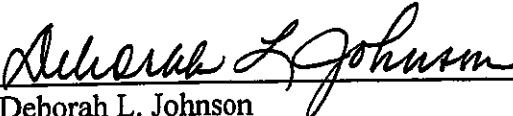
I, the undersigned Administrative Assistant of the law offices of Hall & Bowers, LLC, attorneys for Mark Sanford, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by hand delivering a copy of the same to the following address(es):

Pleadings:

**MOTION TO ENJOIN DISSEMINATION OF
INVESTIGATIVE REPORT AND ALL OTHER
MATERIALS RELATED TO THESE
PROCEEDINGS**

Party Served:

Herbert R. Hayden, Jr.
Executive Director
State Ethics Commission
5000 Thurmond Mall, Suite 250
Columbia, SC 29201


Deborah L. Johnson

September 14, 2009